

In the High Court of Judicature, Bombay.

Mon day, the 30<sup>th</sup> day of January 1865.

SPECIAL APPEAL No. 729 — of 1864

Dada Horaji and Narayan  
Mooljee of the Konkan  
District — (Original Defendants) } Appellant &

versus

Babaji Zingoratt of the  
Konkan District — (Original Plaintiff) } Respondent

Rs. 575 — " — "

The claim in the Original Suit was to obtain possession of a house  
and carrying off the balance of the mortgage money.

In Appeal No. 534 of 1863 the ~~Dist. Judge~~ Judge  
of the District of the Konkan at ~~Surat~~ ~~reversed~~  
the Decree of the ~~Judge~~ ~~Parson~~ who had thrown out the claim.

A Special Appeal was preferred in the High Court on the grounds that the deci-  
-sion of the District Judge is contrary to law  
in that.

(a) The Court below rejected the evidence recorded

recorded showing the arrangement between the Plaintiff and the appellant Dada Honajee, by which the former was to pass to the latter an engagement to resell the house for the same sum.

(b) It is quite competent to a party to prove fraud by oral evidence, though such evidence contradict a written instrument.

(c) The evidence in question having the effect of showing that another deed was agreed to be executed, it was quite admissible.

(d) The judge holds that Narayan refused to make out his bill on account of monies expended on ~~the~~ <sup>repairs</sup> without there being any evidence to support the finding.

(e) There being a dispute between the Plaintiff and Defendant N<sup>o</sup>. 1, Appellant Narayan was not bound to recognise the Plaintiff, especially after notice to the contrary from Defendant N<sup>o</sup>. 1.

(f) The full debt secured by the mortgage not having been paid by the prescribed date either by the

mortgagor

mortgagor or any one representing him,  
the mortgage has become converted into  
a sale; and by Hindu law a purchase  
with possession is preferable to a pur-  
-chaser without possession.

(2) There is no evidence in the case,  
of a legal tender. The judge was  
therefore in error in holding a mere  
offer and that too, to pay less than  
what was due, sufficient against  
the appellant.

The Court reverses the decree of the District  
Judge and remands the case for retrial.

Costs to follow the final decision.

R. Couch  
H. Weston  
A. W. Marden

MEMORANDUM OF COSTS incurred in Special Appeal No. 729

of 1864 against the decision of the *Acting Judge* of the District of the *Konkum at* <sup>Kanua</sup> and disposed of on the 30<sup>th</sup> January 1865 by remanding the same for retrial.

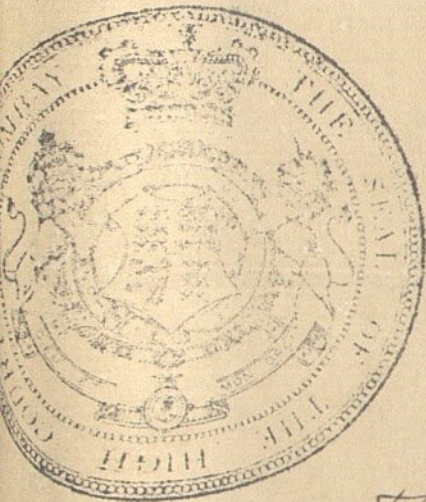
IN THIS COURT.

BY THE APPELLANT—

Stamps for copies of Decree and Judgment .....	3	8	a		
Stamp for Vukeelutnama .....	2	a	c		
Batta for Process and Postage .....	1	14	c		
Sectioner's Fee .....	2	6	6		
Vukeel's Fee one-fourth .....	5	1	c		
				14	13 6
				Rupees....	14 13 6

BY THE RESPONDENT—

Stamp for Vukeelutnama .....	2	a	c		
Vukeel's Fee one-fourth .....	5	1	c		
				7	1
				Rupees....	7 1 a



*W. L. S.*  
*For Seal*  
 The 30<sup>th</sup> day of January 1865.  
*Registrar*

Issued a certificate on Her  
Majesty's Treasury the Bank of  
Bombay for the refund of Rs  
Twenty two being the value of  
stamps used for special  
Appeal in this case

R West  
Registrar

66

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Registrar

The Secretary of Government